

2001

Reassessing the Magnetic Pull of Megacases on Procedure

Richard L. Marcus

UC Hastings College of the Law, marcusr@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#)

Recommended Citation

Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 *DePaul L. Rev.* 457 (2001).

Available at: http://repository.uchastings.edu/faculty_scholarship/449

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications

UC Hastings College of the Law Library

Author: Richard L. Marcus

Source: DePaul Law Review

Citation: 51 DePaul L. Rev. 457 (2001).

Title: *Reassessing the Magnetic Pull of Megacases on Procedure*

Originally published in DEPAUL LAW REVIEW. This article is reprinted with permission from DEPAUL LAW REVIEW and Depaul University College of Law.

REASSESSING THE MAGNETIC PULL OF MEGACASES ON PROCEDURE

Richard L. Marcus*

INTRODUCTION

The procedural Big Bang that we believe followed the adoption of the Federal Rules of Civil Procedure in 1938 enabled proceduralists to think of themselves as central to critical legal developments. Sometimes, others appear to begrudge us that centrality; Professor Coffee, for example, has written that procedure is too important to be left to proceduralists.¹

Since the Big Bang, or at least since World War II, it has regularly been said that the main agent for procedural change in this country has been complex litigation. Although no one can be sure how to define complex litigation, many agree that it is the phenomenon that has regularly preoccupied those who focus on procedure, including the rule makers. Some decry this preoccupation, arguing that it leads to unwarranted generalizations about all litigation and produces remedies that may be desirable for big cases but not for most cases.² Another ongoing theme involves synergy: big cases prompt procedural changes, and, in turn, those procedural changes produce more big cases.

* Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law. Since 1996 I have served as Special Reporter to the Advisory Committee on Civil Rules, and worked actively on the amendments to the discovery rules that went into effect on Dec. 1, 2000. Besides academic commentary, this article draws on comments made during the public commentary process in regard to those amendments. Often the Committee was criticized for designing rules that were prompted only by the needs of complex cases. I have not tried to include citations to those comments. Copies of the comments, and the transcripts of the public hearings on those amendments, are available at the Rules Committee Support Office of the Administrative Office of the United States Courts. I am indebted to Vince Moyer of the Hastings Library for compiling background materials on tobacco litigation.

1. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987) (asserting that, "Just as war is too important to be left to the generals, civil procedure—with apologies to Clemenceau—is too important to be left to proceduralists.")

2. See, e.g., Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 166-68; 188-95 (1997) (stating that by the 1990s judges were applying to ordinary cases the procedures developed in the 1950s to deal with the problems of big cases, and that rule makers tended to devise new procedures based on experiences with big cases but to apply them to all cases).

Because tobacco litigation is widely touted as the biggest of all big cases,³ it seems worthwhile to reflect on the notion that big cases have been the driving force behind procedural change in this country for the last half century. If tobacco litigation is the biggest of all big cases, it should produce the most striking procedural developments. This paper addresses the question whether tobacco litigation has actually done so.

My review of tobacco litigation is that it has been a dud in terms of procedural innovation. Perhaps we should reexamine the entire theme of complex litigation as the sparkplug of modern procedural developments. As Professor Leubsdorf has recently written, the American belief that the adoption of the Federal Rules produced a revolution may be a myth.⁴ The idea that megacases have paved the way for further developments may also be a myth.

To evaluate these questions, I begin with a typology of complex litigation, finding three general groupings of such cases during the post-World War II era. I then connect those groupings to the main strands of procedural innovation during that period, and use the former champion of megalitigation—asbestos litigation—to show how one set of cases can produce myriad changes and attempted changes in procedure.

Against that background, I contrast the relatively limited impact tobacco litigation has had on procedure and offer some explanations why this seems to be the case. In conclusion, I suggest that the presumed connection between megalitigation and procedural innovation may be epochal rather than eternal, and that we may have come to a time when the main innovations will be substantive rather than procedural. Assuming so, tobacco litigation might be a symptom of a new reality, at least for mass torts, in which the scimitar of change shifts away from the proceduralists. But there remain reasons to expect that this change will not happen.

II. A TYPOLOGY OF MEGALITIGATION

This article uses the term “megalitigation” to describe a small category of large-scale complex litigation. Defining complex litigation has proven challenging, even for the editors of the Manual for Complex

3. See Howard Erichson, *Cottail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2 (2000) (asserting that “[t]he tobacco litigation is the most massive in a string of mass torts including asbestos, Dalkon Shield, and breast implants”).

4. John Leubsdorf, *The Myth of Civil Procedure Reform*, in CIVIL JUSTICE IN CRISIS (A. Zuckerman, ed., 1999), at 53.

Litigation,⁵ so one must approach the task of offering a typology of megalitigation diffidently. Nonetheless, courts have begun to recognize this new subcategory of complex litigation. Confronting a huge securities case, for example, Chief Judge Becker of the Third Circuit remarked that it “presages a new generation of ‘mega-cases’ that will test our previously-developed jurisprudence.”⁶ There seem to be three main categories of such litigation during the last fifty years, and these appear to have assumed prominence during different parts of that period. For one anxious to relate these phenomena with procedural change, a typology is a good place to start.

A. Large-Scale Commercial Litigation

The first major category consists of commercial cases. Of course, not all commercial cases are included; only those of the largest dimensions could qualify as megalitigation. Before 1950, those sorts of cases, particularly antitrust cases, had already emerged as distinctive. Thus, in 1949, the Judicial Conference appointed a committee headed by Judge E. Barrett Prettyman to study the problem of “protracted litigation.”⁷ This sort of litigation was not, obviously, entirely un-

5. See MANUAL FOR COMPLEX LITIGATION (1969). The original Manual for Complex Litigation, published in 1969, defined complex litigation as “cases which present unusual problems and which require extraordinary treatment,” and also described types of “potentially complex cases,” focusing on either the type of claim made (e.g., antitrust, patent, or mass disaster) or the procedural characteristics of the case (e.g., multiparty cases, class actions, or derivative actions). See MANUAL FOR COMPLEX LITIGATION §§ 0.10; 0.22 (1969). The second edition, published in 1985, did not even attempt such a definition. The third edition, published in 1995, acknowledged the prior version’s ambivalence on the subject of definition, and offered a “functional definition of complex litigation” that looked to the need for judicial management of the case. MANUAL FOR COMPLEX LITIGATION 3 (3d ed. 1995).

Others have continued to try to come up with catalogues to identify these cases. The California Rules of Court, for example, recently adopted a special scheme for “complex cases” with provisional designation as complex for the following: antitrust or trade regulation claims, construction defect claims, securities claims, environmental or toxic tort claims, mass torts, class actions, or insurance coverage claim arising of any of the foregoing. See Cal. Rules of Court 1800(c).

Academics try to come up with definitions as well. For an example, see Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1673 (1992) (arguing that complex cases involve at least one of four “modes of complexity” with the “unifying attribute” that the case can be resolved only “through the accretion to the federal judiciary of powers traditionally assumed by other ‘actors’ (parties, lawyers, jurors and state courts)”).

6. *In re Cendant Corp. Litig.*, 264 F.3d 201, 218 (3d Cir., 2001).

7. Hon. E. Barrett Prettyman, The Report on Procedure in Anti-Trust and Other Protracted Cases, in Hon. Leon R. Yankwich, “Short Cuts” in Long Cases, 13 F.R.D. 41 (1951) (hereinafter “The Prettyman Report”). The report explained that it focused on cases involving “many issues, many defendants, hundreds of exhibits, . . . [and] . . . weeks or months of hearings . . . [with] . . . thousands of pages of testimony.” These cases, “while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice.” *Id.* at 63-64. It added

known before 1938. Some of the most notable litigation of the Progressive era, for example, consisted of antitrust suits brought by the government. Some of them produced decrees that remained in effect at mid-century.⁸ The recent governmental action against Microsoft shows that this sort of case is not dead.⁹

Yet by 1950, the private antitrust action was emerging as important in its own right, and securities fraud litigation began to emerge as another category of private suit that deserved attention. It is worth noting that it was not until 1947 that a federal court first recognized a private right to sue for violation of Rule 10b-5.¹⁰ During the 1950s, there were a number of sessions organized by the federal judiciary to study the problems of this sort of suit.¹¹

Until the 1970s, large-scale commercial litigation ordinarily involved claims by individual plaintiffs or the government against corporate defendants and those associated with them. As Bryant Garth noted, however, a new species of commercial megacase became prominent during the 1970s and 1980s, when businesses that formerly eschewed litigation against one another came to view it as a legitimate, and sometimes attractive, strategic maneuver.¹² This development led Garth to report in 1993 that the most important recent development was the emergence of "mega-litigation," with a theme of escalating conflict in such cases. This is not to say that the individual plaintiff suit became insignificant during this period, but it was joined with an important subcategory of commercial litigation between large commercial entities.

that "[m]any of the suggestions and comments which it contains are inappropriate in ordinary actions." *Id.* at 64.

8. Perhaps the classic illustration is the consent decree entered against the meatpackers to ward off a threatened antitrust action by the government in 1920. The decree precluded defendants from vertical integration in the meatpacking industry, a prohibition that seemed to some to be less important as the decades passed and large retail distributors of food products developed. Nonetheless, the decree endured into the 1970s. For a description of this history, see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1029-35 (1985).

9. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (affirming in part and reversing in part after the District Court found antitrust violation and ordered company to be split in two).

10. See *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947) (recognizing private right of action for violation of federal securities fraud statutes).

11. See, e.g., *Proceedings of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957) (describing sessions at N.Y.U. Law School); *Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 319 (1958) (describing sessions at Stanford Law School).

12. Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 932, 941-42 (1993) (describing "mega-litigation" involving large corporations).

B. Public Law Litigation

If postwar America has a legal icon, it is *Brown v. Board of Education*.¹³ *Brown I* crystallized a version of equality that remains central to the United States. But for those focused on trends in litigation, the more significant aspect of the case emerged in *Brown II*,¹⁴ in which the Supreme Court began to grapple with judicial implementation of the constitutional principles like those articulated in *Brown I*.

To an important extent, the Warren Court ushered in an era of constitutional challenges to governmental activity. School systems could be and were sued for segregation. Prisons could be and were sued for having inhumane conditions. Meanwhile, legislation expanded the opportunity for broad scale challenges to the operation of public and private entities. Although the civil rights acts of the Reconstruction Era had been on the books for three quarters of a century, it was not until 1968 that their full potential began to be realized.¹⁵ And during the 1960s and 1970s, an array of new legislation permitted private and governmental actions in court to enforce statutory guarantees.¹⁶ Employment discrimination, civil rights, and gender equity — these topics were added to the list of statutory claims that could be brought to court. Professor Chayes identified what followed as an outburst of “public law litigation” in his seminal 1976 article.¹⁷ Chayes asserted that “the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”¹⁸

As suggested by the challenges of *Brown II*, this new form of megalitigation did not readily fit the conventional mold for litigation. Identifying the proper parties was often difficult. Fashioning an

13. 347 U.S. 483 (1954) (holding de jure segregation in public schools unconstitutional).

14. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (addressing the problem of remedy).

15. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (recognizing right to sue under 42 U.S.C. § 1982 for private racial discrimination). Not all were glad to see this happen. Consider the following lament from a federal judge in 1971:

The etiology of judicial distress can be stated briefly: we have poured more into courts than they can digest. The legal profession and the general public have long accepted the premise that any controversy that can be cast in the form of a lawsuit should have a ticket of admission to the courts.

Shirley M. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 SO. CAL. L. REV. 901, 906 (1971).

16. See, e.g., Francis Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 501-02 (1979) (describing the explosive growth of filings under some new legislation).

17. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing emergence of “new model of civil litigation”).

18. *Id.* at 1284.

appropriate decree often proved highly problematic because the broad generalizations of constitutional or statutory guarantees did not provide judges much guidance about how to remedy a violation.¹⁹ Judges were called upon to devise highly particularized directives that depended upon great familiarity with the institutions they were trying to change. And some remedies, such as busing to undo the effects of discriminatory pupil assignment, could produce political and jurisdictional problems. Moreover, the remedies had to remain in place for long periods of time, and troubling questions about when the court-imposed regime should be removed lay waiting in the future.

It is not surprising, therefore, to find that Professor Chayes concluded that a "new model of civil litigation" had emerged from these cases. As Professors Eisenberg and Yeazell pointed out, the features Professor Chayes identified with the new form of litigation could be found in old litigation as well.²⁰ For example, as noted above, anti-trust cases from the early part of the century often required judges to calibrate a decree to achieve a general objective of restoring and preserving competition through decades of operation. Yet, at least the frequency and sometimes the public prominence of the new form of litigation make it an important category for our consideration.

Recently, the importance of this category seems to have receded. In part, this development may have occurred because, as Professor Chayes observed in 1982, "the long summer of social reform that occupied the middle third of the century was drawing to a close."²¹ But cases of this sort are still being filed.²² And the definition of "public law" is not as easy as Professor Chayes seemed to think. For example, litigation designed to use common law tort doctrines to counter public health risks could easily be likened to litigation designed to serve other public interests, particularly if the court could be persuaded to look beyond traditional damages remedies in fashioning judicial relief.²³ This leads to the third general category of megalitigation.

19. See Richard Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 680 (1988) (describing the difficulty courts confronted in developing specific remedies to general constitutional violations.)

20. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that "new" model litigation was actually not too different from its older forbearers).

21. Abram Chayes, Foreword, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982).

22. See, e.g., *NAACP v. City of Thomasville Sch. Dist.*, 187 F.R.D. 690 (M.D. Ga. 1999) (class action alleging racial discrimination against school district).

23. See *supra* Marcus, note 19, at 671-74 (comparing personal injury litigation with "public law" litigation).

C. Mass Tort Litigation

Tort litigation is hardly a new phenomenon. Mass tort litigation, however, seems to have leaped into American courtrooms in the 1980s. It was not unknown before that. The single accident mass tort concept had been with us at least since Professor Estep urged in 1960 that the legal system be adapted to deal with the potential challenges of claims based on nuclear accidents.²⁴ The MER/29 litigation of the 1960s was a forebearer of contemporary mass tort litigation.²⁵

It was not until the 1980s, however, that mass torts began to receive broad attention. In 1981, Judge Spencer Williams sounded a warning about this sort of litigation to explain his insistence on using a class action in Dalkon Shield cases:

The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level. Indeed, certain products have achieved such national notoriety due to their tremendous impact on the consuming public, that the mere mention of their names—Agent Orange, Asbestos, DES, MER/29, Dalkon Shield—conjures images of massive litigation, corporate stonewalling, and infrequent yet prevalent, “big money” punitive damage awards²⁶

The Johns Manville Chapter 11 filing in 1982 confirmed the growing importance of mass tort litigation by showing that a seemingly vital company could be felled by multiple tort suits.²⁷

During the 1980s and 1990s, mass torts were the most prominent sort of megalitigation. Reflecting his broad experience with this development, Professor McGovern has helped us to distinguish between “immature” and “mature” mass tort litigation.²⁸ But there is still some uncertainty about what exactly qualifies as “true” mass tort litigation. Thus, the Working Group on Mass Torts, appointed by Chief Justice Rehnquist to study the resulting problems, warned that there

24. Samuel D. Estep, *Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation*, 59 MICH. L. REV. 259 (1960) (analyzing problems of causation and damage measurement, and suggesting consideration of a “contingent injury fund” to cope with these difficulties).

25. See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968) (describing evolution and management of this litigation).

26. *In re N. Dist. of California “Dalkon Shield” IUD Products Liability Litigation*, 526 F. Supp. 887, 892 (N.D. Cal. 1981), *rev’d*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171 (1983).

27. See *infra* note 139 for discussion of this point.

28. See, e.g., Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (describing “mature mass tort litigation” in which “there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs’ contentions”).

was a risk courts might “create” mass torts by assuming that ordinary recurrent litigation really constitutes a mass tort.²⁹

III. THE CONNECTION BETWEEN MEGALITIGATION AND PROCEDURAL CHANGE

The above typology uses definitions that have fuzzy perimeters. The dividing line between megalitigation and other complex litigation is hard to articulate. When ordinary tort litigation mutates into mass tort litigation is debatable. Public law litigation may be difficult to distinguish from mass tort litigation, and most commercial suits surely are not megacases. So there is reason to doubt that a vaguely defined category of cases has precipitated procedural change.

But it is clear that those who promote procedural change say that they are concerned with megacases and use them as reasons for making the changes. In the 1940s and 1950s, for instance, the focus was on “protracted cases,” a small minority of all cases, and it resulted in the 1960 publication of the *Handbook of Recommended Procedures for the Trial of Protracted Cases*,³⁰ the forerunner of the *Manual on Complex Litigation*.

Perhaps in reaction, those who question procedural changes often criticize them on the ground that they are stimulated by and designed for the problems of a small subset of cases. Thus, Professor Galanter objected to generalizations about problems in civil litigation made by those who are “attuned to the ‘top’ of the system . . . that small segment of law practice that deals in large cases, and thus to the concerns of large clients.”³¹ And Professor Resnik repeatedly has criticized the rule makers for taking rules designed for complex, large-scale cases and making them applicable to all litigation.³² As Professor Rosenberg put it, “Cadillac style procedures are not needed to process bicycle-size lawsuits, yet that is what the rules often appear to require.”³³

Although one can question these generalizations, a brief survey of the principal areas of procedural innovation during the last fifty years

29. See REPORT ON MASS TORT LITIGATION 14-21 (1999) (describing the problem of “elasticity” — the way in which aggregation of tort cases itself operates as a force that prompts filing of more cases).

30. 25 F.R.D. 351 (1960).

31. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 46 (1983).

32. See Resnik, *supra* note 2.

33. Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 247 (1984).

suggests that they do in fact correspond even if they do not only respond to the demands of these sorts of cases.

A. Joinder and Class Actions

The first major task that the Advisory Committee on Civil Rules undertook upon being reconstituted in the late 1950s was to revise the formalistic joinder provisions adopted in 1938.³⁴

At least in some ways, this effort consciously sought to equip the federal courts with the tools necessary to deal with one species of complex litigation, public law structural suits. Facilitating civil rights suits was a primary objective of the framers of Rule 23(b)(2),³⁵ and that, in turn, provided a framework for the structural litigation cases Professor Chayes described a decade after the amendment went into effect. Appropriately, his famous article was published in the issue of the *Harvard Law Review* that contained its *Developments in the Law: Class Actions*.³⁶ Surely, the connection was not lost on the Review's editors.

But the framers of revised Rule 23 hoped to avoid enabling another species of megalitigation, the mass tort suit. Their Committee Note explicitly disapproved of using class actions in mass accident cases.³⁷ So in that respect, the amendment to Rule 23 was hardly prompted by megalitigation, and the framers worried about creating certain types of megalitigation. With the passage of time, however, their admonition receded from view, and the apparent needs of mass tort litigation prompted mass tort class actions, as depicted in the discussion of asbestos litigation below.³⁸ Once enacted, procedural rules can facilitate results their creators hope to avoid.

34. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967) (describing new multiparty joinder rules). Before this, the newly reconstituted Civil Rules Committee had finished work on amendments first proposed by its predecessor, which was discharged in 1956. See Benjamin Kaplan, Amendments to the Federal Rules of Civil Procedure, 77 Harv. L. Rev. 601 (1964) (describing completion of earlier work).

35. See 7A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1775 at 470 (1986) ("subdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area").

36. *Developments in the Law of Class Actions*, 89 HARV. L. REV. 1318 (1976).

37. See Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 103 (1966) (A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability, would be present, affecting the individuals in different ways.").

38. See *infra* notes 88-100 and accompanying text. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court recognized that events had passed the Advisory Committee Note by:

The other joinder rules have received less attention, but they also play an important role in connection with megalitigation. Intervention, in particular, has flowered in certain forms of public law litigation to enable diverse interests to be heard in such cases as environmental suits. This development has occurred in synch with the evolution of standing requirements, and there remains a question whether interveners must demonstrate standing in addition to satisfying the intervention requirements of Rule 24.³⁹

Necessary party provisions also play an important role in such cases. In employment discrimination litigation, for instance, *Martin v. Wilks*⁴⁰ directed that nonminority employees must be joined under Rule 19 if the action seeks certain types of affirmative action relief that would trespass on their employment or promotion expectations.

The demands of Rule 19 in public law litigation spawned further procedural reform, albeit from Congress. Accordingly, the 1991 Civil Rights Act sought to obliterate the rule of *Martin v. Wilks*.⁴¹ This provision of the Act could close the door on challenging many extant decrees,⁴² but its solution may also strengthen the argument in future cases.⁴³ In the same Act, Congress authorized damages recoveries for Title VII claimants, thereby possibly subverting efforts to gather these

The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability . . . affecting the individuals in different ways." And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. But the text of the Rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970's, have been certifying such cases in increasing number.

Id. at 625 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697). In the wake of this burial, it would seem that the Note, by itself, no longer constitutes a significant obstacle to class certification.

39. Compare *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998) (holding that interveners need not possess standing) with *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998) (holding that party that seeks to intervene as of right must demonstrate standing).

40. 490 U.S. 755 (1989).

41. See 42 U.S.C. § 2000e-2(n)(A)(1) (1991) (limiting challenges to judgments resolving claims of employment discrimination).

42. The Act does not do even that if, as has been held, it does not apply to decrees entered before the statute was adopted. See *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994) (holding that Act should not be applied retroactively); cf. *E.E.O.C. v. United Ass'n of Journeymen*, 235 F.3d 244, 254 n.2 (6th Cir. 2000) (agreeing that the Act should not be applied retroactively).

43. If the legislation means that a nonparty who previously would have been able to escape the binding effect of the decree in separate litigation is now unable to do so, that would seem to make that party a person who should be joined under Federal Rule of Civil Procedure 19(a)(2)(i).

claims in “hybrid” Rule 23(b)(2) class actions for monetary and injunctive relief.⁴⁴

Another area of megalitigation, securities class actions, also prompted procedural legislation by Congress in 1995 and 1998. The earlier bill sought to change class action practices to require that the class representative have a substantial stake in the litigation, as well as introducing some other procedural obstacles to prosecution of these cases.⁴⁵ The later bill sought to prevent plaintiffs’ lawyers from avoiding the new federal court requirements by filing their cases in state court.⁴⁶

Thus, the experience under the joinder rules has been that procedural innovation can “enable” some kinds of megalitigation, and that developments in megalitigation prompt further procedural “reform.” Whether that reform accomplishes its objective is less clear. The Civil Rights Act of 1991, for example, probably was not designed to hamper the filing of hybrid employment discrimination class actions, but it may have that effect.

B. Multidistrict Transfer and Consolidation

The enactment of the multidistrict transfer statute was certainly not as momentous as the revision of the joinder rules, but it is a prime example of the causal relationship between megalitigation and procedural change. It also illustrates how procedural changes can facilitate megalitigation.

The immediate stimulus for the multidistrict transfer statute was the outburst of commercial litigation in the wake of prosecutions for price-fixing in the electrical equipment industry. Confronted with about two thousand separate private antitrust actions in thirty-five different federal district courts, the judiciary initially reacted with informal innovation. Chief Justice Earl Warren appointed a Coordinating Committee for Multiple Litigation composed of nine federal judges to avoid the chaos that might otherwise have enveloped the federal

44. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (holding that an employment discrimination class action was not predominantly for equitable relief because it sought damages as allowed under the 1991 Civil Rights Act). For discussion, see Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847 (2000).

45. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.) (imposing new pleading and lead counsel requirements in securities fraud class actions).

46. Securities Litigation Uniform Standards Act, Pub. L. 105-353, 112 Stat. 3227 (1998) (codified in various sections of 15 U.S.C.) (requiring, among other things, that most securities fraud class actions be brought in federal court).

courts had the depositions of key witnesses been scheduled in hundreds of cases. The litigation went forward smoothly under the supervision of the ad hoc committee, which occupied itself with avoiding duplicative discovery. Whether this sort of formality was really required is debatable. During roughly the same period of time, similar efficiencies were effected in the MER/29 litigation by informal arrangements created among counsel without organized judicial oversight.⁴⁷ Nonetheless, the success of this activity in the electrical equipment cases prompted Congress to institutionalize the experiment by creating the Judicial Panel on Multidistrict Litigation in 1968.⁴⁸

Whether or not Congress so intended, the Act contained the seeds for more aggressive use of the procedure because the Panel was authorized to transfer cases for all "pretrial purposes." Some in Congress were concerned about the potential impact of this new procedure and sought to limit the authority of transferee judges to managing discovery.⁴⁹ But the scope of discovery may depend on resolution of other matters such as motions to dismiss or for summary judgment, and the statutory grant was not limited to discovery.

Multidistrict transfer enabled courts to accomplish for separate cases something like what the 1966 revision of the joinder rules made possible within a single case. Although the statute directed that the cases be returned once the pretrial phase was completed, transferee judges were quick to seize the opportunity to take an active role in resolving litigation without returning the cases. Relying on their broad pretrial authority, they often used 28 U.S.C. § 1404(a) to transfer these cases to themselves for all purposes, including trial. Within a decade, it was clear that the vast majority of cases never returned after multidistrict transfer.⁵⁰

This transfer power could also be used to achieve goals beyond litigation efficiency by concentrating cases in a single forum and thereby empowering a single judge to choose a coordinated outcome for the merits of the consolidated cases. For example, when limited supplies prevented Westinghouse Electronic Corporation from meeting its contractual commitments to deliver uranium in the mid-1970s, it at-

47. See generally Rheingold, *supra* note 25.

48. Multidistrict Litigation Act of 1968, Pub. L. 90-296, 82 Stat. 109, *codified at* 28 U.S.C. § 1407 (2001).

49. See Roger Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 804-09 (1985) (criticizing broad use of transfer authority to decide non-discovery matters).

50. See Stanley Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581, 583, (1978) (reporting that § 1404(a) transfer was "an accepted procedure" and that only about 5% of cases transferred by the Panel were remanded).

tempted to use interpleader to force all the claimants into a single court. It was unsuccessful.⁵¹ When the claimants sued separately, however, Westinghouse was able to obtain a transfer order from the Panel, which hoped thereby to “eliminate the possibility of colliding pretrial rulings by courts of coordinate jurisdiction, and avoid potentially conflicting preliminary injunctive demands on Westinghouse with respect to its delivery of uranium.”⁵²

Multidistrict transfer similarly magnified the importance of a related procedural technique—consolidation under Rule 42, which can create proceedings resembling class actions.⁵³ This potential presumably always existed, but it was fully realized only with the advent of mass tort litigation. As a technique, it became the centerpiece of the recommendations of the American Law Institute’s Complex Litigation Project,⁵⁴ and is, therefore, another instance in which megalitigation prompted procedural innovation. At the same time, the capacity of courts to confect gargantuan proceedings by consolidation tends to create megalitigation as well.⁵⁵

What started as a response to the demands of commercial megalitigation thus became, to some extent, a technique for the creation and concentration of mass tort megalitigation. In mass tort cases, multidistrict transfer holds the potential for creating megalitigation. The Supreme Court’s 1998 ruling that a transferee judge could not use § 1404(a) to transfer cases to herself for purposes of trial somewhat curtailed the potential of the device.⁵⁶ But this decision may be overturned by Congress,⁵⁷ and, in any event, there are ways to sidestep it.⁵⁸

51. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 405 F. Supp. 316, 317 (J.P.M.L. 1975) (describing interpleader action).

52. *Id.* at 319.

53. See generally Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LIT. 495 (1991).

54. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) (proposing use of expanded transfer powers to deal with problems caused by dispersed litigation). For discussion, see Richard Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879.

55. See Marcus, *supra* note 54, at 882-87 (describing consolidation as a “sleeping giant”).

56. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

57. Legislation has been introduced in Congress to authorize transfer for trial. See H.R. 860, 107th Cong., 1st Sess., § 2.

58. See, e.g., *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000) (holding that plaintiffs’ stipulation to proceed to trial in the transferee court sufficed to permit it to hold a trial).

C. Discovery

Discovery is another area in which procedural changes may prompt megalitigation and megalitigation appears to spark procedural change.

As Professor Subrin has shown, the Big Bang of 1938 did produce a genuine revolution by introducing routine broad discovery.⁵⁹ Broad discovery, in turn, can contribute to megalitigation in part by unearthing evidence that supports claims by many. Although the direct contribution of broad discovery to success in certain types of claims is debatable, it certainly played some role by supporting these claims. In commercial litigation, for example, discovery may be a lifeline for plaintiffs who could not have a hope of making out a case without it. Mass tort litigation battles over discovery also evidence the importance of the procedure. Were it not for a real concern that broad discovery could yield harmful evidence, it is unlikely that defendants would resist as energetically as they do. Defendants' insistence that discovery be held under wraps, even in relation to other litigation on the same subject, supports this suspicion.

Another way in which broad discovery can contribute to megalitigation is by raising the financial cost of litigating. Repeatedly, those who object that discovery is out of control cite the problem of "one-way discovery," which results from the reality that in many cases one side (usually the defense) has an enormous amount of information while the other (usually the plaintiff) has little. In those circumstances, the parties may often have very different incentives about broad discovery requests. Defense interests assert that plaintiffs will use discovery as a club to impose costs on defendants. Plaintiffs, in turn, assert that defendants use "dump truck" discovery responses as methods of overwhelming their adversaries. In litigation between businesses, meanwhile, there may be incentives to cooperate to avoid undue discovery expense. But the recent expansion of aggressive litigation between businesses suggests that this sort of self-restraint may not be universal in such cases; reasonable behavior may merely be one among many strategic options.

For a quarter century, these concerns have prompted calls for discovery reform. From the outset, those calls have focused on large-scale litigation, and they have been academically criticized as skewed by emphasis on big-case litigation. Most recently, the Federal Judicial Center's 1997 survey of recently closed federal cases showed that in

59. See Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) (describing revolutionary break with the past wrought by the adoption of the federal discovery rules).

most cases, discovery worked relatively smoothly, but in a small proportion of highly contentious cases, often those with high stakes, discovery generated significant problems.⁶⁰

Responding in a gradual way to these calls for change, the rule makers have adopted a variety of techniques to ameliorate the reported difficulties with discovery, mainly in large cases. The re-definition of the scope of discovery, finally made in 2000,⁶¹ was originally proposed in the 1970s largely as a way of responding to the demands of large document litigation.⁶² Numerical limitations on various discovery events⁶³ and the requirement that the parties develop a discovery plan before embarking on formal discovery⁶⁴ also seems most pertinent in complicated litigation.

But other changes appear to point in a different direction, despite the anguished objections of those involved with megalitigation. The most striking example of that sort of anguish is the opposition occasioned by the 1991 proposal to introduce initial disclosure,⁶⁵ a requirement that could be straightforward in simple cases but onerous in high-stakes litigation, particularly if the complaint does not identify the claim with precision. The version of disclosure ultimately adopted in 1993 tried to overcome that concern with a particularity requirement,⁶⁶ and the returns from those who used disclosure were generally quite favorable. But when a more modest form of disclosure was made nationally obligatory in 2000, there was again objection that “complex” cases should be exempted as a category. Perhaps ironi-

60. See Thomas E. Willging, et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). The study found that discovery problems differ depending on the nature of the case, and noted that, “where a lot of money is at stake, where the relationships are contentious or the issues are complex, there is more discovery and there are more problems.” *Id.* at 555. It cautioned, however, that this might not mean the problems are “more likely to occur as a consequence of case complexity,” but rather simply that there are more problems in some cases because there is more discovery in those cases. *Id.*

61. See FED. R. CIV. P. 26(b)(1) (allowing discovery of matter relevant to the claim or defense of any party, but reserving discovery of material relevant only to the “subject matter” involved in the suit to judicial control).

62. See generally, Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 756-60 (1998) (describing the 1978 proposal to narrow the scope of discovery).

63. See FED. R. CIV. P. 30(a)(2)(A) (limiting number of depositions to ten); FED. R. CIV. P. 33(a) (limiting number of interrogatories to twenty-five).

64. FED. R. CIV. P. 26(f).

65. See Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brooklyn L. Rev. 761, 805-12 (1993) (recounting the controversy).

66. See *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 431 (1993) (1993 version of FED. R. CIV. P. 26(a)(1)(A) and (B)).

cally, however, only very simple cases were categorically exempted.⁶⁷ Somewhat similar objections—that this would not suffice for complex cases—emerged to the proposal adopted in 2000 to limit depositions to “one day of seven hours.”⁶⁸

D. Judicial Management

From many perspectives, the most pervasive change in judicial procedure during the last fifty years has been the rise of case management. There is some evidence that mid-century judges took almost no interest in civil cases pending before them until trial was imminent, or at least until a motion was filed. Now, federal judges behave very differently. American case management has not only swept this country, but also has become a beacon of hope to judicial reformers in England.⁶⁹

A major stimulus behind this change was large-scale litigation. The Prettyman Committee began the shift in judicial attitude by focusing on the particular problems of “protracted litigation.”⁷⁰ As Professor Chayes argued in 1976, the peculiar demands of public law litigation thrust the judge into the central role in that sort of case, and he therefore focused his analysis on the role of the judge.⁷¹ In 1985, I concluded that “it is obvious that complex litigation was the nose by which the camel of judicial control got into the litigation tent, and that complex litigation is providing a model for the handling of all litigation.”⁷²

This may give megalitigation more credit than it deserves. The current orientation is toward outwardly similar judicial intrusion into lawyer control of litigation across a wide spectrum. And some explanations for this judicial behavior have no particular application to large cases. To the contrary, the argument is that litigation generally has become too costly and takes too long.⁷³ In passing the Civil Justice Reform Act, Congress took that view. Thus, it endorsed judi-

67. See FED. R. CIV. P. 26(a)(1)(E) (enumerating categories of proceedings exempted from initial disclosure).

68. FED. R. CIV. P. 30(d)(2).

69. See ACCESS TO JUSTICE (Final Report of the Lord Chancellor) (1996) (recommending development of case management for English courts). For discussion of this effort, see A.A.S. ZUCKERMAN & ROSS CRANSTON, REFORM OF CIVIL PROCEDURE (1995).

70. See Prettyman Report, *supra* note 7, at 8.

71. See Chayes, *supra* note 17.

72. RICHARD MARCUS & EDWARD SHERMAN, COMPLEX LITIGATION 13 (1985).

73. See Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) (justifying active judicial management of most litigation).

cial management as a cure for small or moderate-sized cases, but not for megalitigation.⁷⁴

Other features support the conclusion that, whatever case management may become for litigation in general, it plays a special role in connection with complex litigation. Rote case management may become more common in mid-range cases, with tailored orders and frequent supervision limited to large cases. Already, Rule 16(b) permits districts to exempt small cases from case management,⁷⁵ and various experiments with “tracking” systems substitute form directives for case control measures that take account of the individual characteristics of the cases.⁷⁶ The new discovery amendments exempt eight categories of simple cases from the required early conference of counsel to develop a discovery plan.⁷⁷ It seems obvious that judges are likely to spend more time on the details of cases with higher stakes. The recent imposition of numerical limitations on discovery may tend to accentuate the focus of judicial control on large cases. Most cases, for instance, do not involve more than ten depositions, so judicial involvement to grant a dispensation from that limitation would be limited to larger ones.

E. Settlement Promotion

Beyond case management, promotion of settlement has become a central procedural theme during the last quarter century. To some extent, complex cases may have provided judges with their initial exposure to this activity. In public law litigation, Professor Chayes suggested that the judge’s inability to design complicated remedial regimes would incline her to urge the parties to agree on a remedy, even if the question whether the defendant’s conduct violated the law

74. Civil Justice Reform Act of 1990 § 102, Pub. L. 101-650, 104 Stat. 5089, 5090 (setting forth findings by Congress that emphasized “techniques for litigation management and cost and delay reduction” and invoked evidence that “suggests that an effective litigation management and cost and delay reduction program” should incorporate certain features).

75. See Fed. R. Civ. P. 16(b) (providing that the rule’s case management requirements don’t apply to “categories of actions exempted by district court rule as inappropriate”).

76. One reason for doing this may be to reduce the burden on judges. Professor Subrin explains:

Case-by-case management developed because the transaction costs of procedural rules with broad attorney latitude were too high. As a result of federal local rules and state experimentation, the judiciary has already demonstrated that it thinks the transaction costs of ad hoc case-by-case management are also too high. Judges are already turning to formal limitations and definitions in order to reduce transaction costs.

Stephen Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2049 (1989).

77. See FED. R. CIV. P. 26(a)(1)(E).

was resolved by customary adjudication.⁷⁸ The judge who received the Westinghouse uranium cases, for example, went so far as to invite the lawyers to his house for cocktail parties before settlement meetings to get them to relax and interact.⁷⁹ Mass tort cases, in turn, have involved some of the most striking judicial settlement promotion.

More generally, however, it seems that settlement promotion has taken hold at least as much for ordinary cases as complex ones. Courts that hold "settlement days" or "settlement weeks" do not do so for the relatively few major cases on their dockets. And the proliferation of court-annexed settlement procedures shows that judicial settlement promotion has increasingly been employed for most cases, not just big ones. At the same time, it may be that complex cases are the ones in which innovative judicial involvement may play the greatest role. In mass tort litigation, for example, settlement discussions often involve demands by defendants for "global peace" that cannot be accomplished without innovative judicial orders.⁸⁰

F. Preclusion

Preclusion largely remains a preserve for case law development, but it has evolved significantly over the last fifty years. The Restatement (Second) of Judgments appeared in 1982, and it relaxed the tighter traditional focus of claim preclusion (*res judicata*) and urged the use of a transactional focus instead.⁸¹ Meanwhile, the Supreme Court has largely abandoned the former mutuality requirement for issue preclusion (*collateral estoppel*).⁸²

These developments might have been stimulated by, and had great potential value, for megalitigation. Particularly in mass tort situations, and to some extent in commercial litigation, a key problem is proliferation of suits raising the same issue. But it is not easy to conclude that, in fact, the evolution of these principles was prompted by such

78. See Chayes, *supra* note 17, at 1298-99.

79. See Hubert L. Will, et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 212-13 (1977) (offering description by Judge Robert Merhige of the cocktail party technique he used to lubricate relationships among counsel in the case).

80. For example, in litigation alleging that birth defects resulted from use of Bendectin, the district judge certified a mandatory class as a judicial accommodation to a settlement the lawyers had reached because the defendant insisted on mandatory class certification before settling. See MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS* 193 (1996). For an evaluation of this effort, see Richard Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 238-42 (1997).

81. See RESTATEMENT OF JUDGMENTS (SECOND) § 24 (1982) (directing that claim preclusion extend to the entire "transaction" involved in litigation).

82. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (granting trial courts broad discretion to decide whether to allow offensive use of non-mutual collateral estoppel).

cases. The Supreme Court's gradual abandonment of mutuality involved cases falling somewhat within the bounds of complex commercial litigation, but the expansion of res judicata hardly seems to have been motivated by such litigation. To date, preclusion has neither seemed to prompt nor to shape megalitigation, although the possibility of non-mutual offensive issue preclusion may have prompted defendants toward more resolute defense of individual cases.⁸³

G. Recapitulation

Certainly the foregoing are not the only procedural trends of the last half century,⁸⁴ but they are together the most prominent. At a general level, many procedural changes can be related to the growth of complex litigation. Only one, the creation of the Judicial Panel on Multidistrict Litigation, directly resulted from megalitigation. Others, such as judicial management, seem to have been stimulated initially by such litigation, but not to be limited to it in full operation. So the causal link between megalitigation and procedural innovation is generally moderate, although in a number of instances complex litigation seems to have played a significant role in stimulating the development. Turnabout being fair play, many of the procedural innovations have played a role in creating complex litigation. As Professor Hensler wrote in 1993, "there was an evolution of civil procedures which ultimately facilitated mass tort litigation."⁸⁵ There seems, therefore, to be a meaningful connection between complex litigation and procedural change during the past fifty years.

IV. ASBESTOS LITIGATION: THE POSTER CHILD FOR PROCEDURAL INNOVATION IN MEGALITIGATION

Assuming that megalitigation can be linked to procedural innovation in the general way suggested above, it need not follow that any one episode of megalitigation is likely to prompt such change all by itself. Obviously, some specific instances of large-scale litigation do so; the adoption of the multidistrict litigation statute in response to

83. But see Elinor D. Shroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 70 IOWA L. REV. 917 (1982) (suggesting that the relaxation of mutuality did not prevent inappropriate relitigation, and proposing further measures including expanded consolidation of cases).

84. Others that come to mind include the increased reliance of judges on sanctions partly prompted by the 1983 amendment to Federal Rule of Civil Procedure 11 and the increased reliance of judges on summary judgment to resolve cases.

85. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1029 (1993).

the experiment with the electrical equipment cases is the most obvious example.

Some types of megalitigation stimulate innovation across a wide range of procedures; of these, asbestos litigation is, perhaps, the best example. To a large extent, this has resulted from invention born of necessity. As Judge Becker put it fifteen years ago, asbestos cases presented "the most serious crisis in the federal court system has faced in its history."⁸⁶ By 1990, this crisis had prompted Chief Justice Rehnquist to appoint the Ad Hoc Committee on Asbestos Litigation to study possible solutions. The committee recommended that Congress devise a solution,⁸⁷ but that has not happened. Courts have, therefore, continued trying to develop various procedural means to cope. A survey of some of those efforts shows how pervasively asbestos has affected procedural rules. Indeed, one could teach a fairly comprehensive course in complex litigation using materials from asbestos litigation alone.

A. Joinder and Class Actions

Asbestos litigation is at the cutting edge of recent class action developments, despite the stated opposition of the framers of the 1966 amendments to mass tort class actions.⁸⁸ But one could also say that asbestos litigation represents the failure of class actions to deal with the problems of this type of megalitigation.

The starting point is that common question class action treatment, which was the innovative feature of the 1966 Rule 23 amendments, seemed peculiarly inappropriate for asbestos litigation because such cases regularly involve particularly challenging individual issues that could not easily be resolved in the class action context. But some issues, notably the viability of the "state of the art" defense, might suffice to permit class certification. And Judge Robert Parker, emphasizing the significance of those issues in individual asbestos trials before him, certified a class action for all cases pending in his court, which the Fifth Circuit upheld in 1986.⁸⁹ This may have been the high water point for successful mass tort class actions, and it bears

86. See Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefit of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 815 (1992) (quoting Judge Becker).

87. See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) (recommending that Congress consider a national legislative scheme to handle asbestos claims).

88. See *supra* note 37 (quoting 1966 Advisory Committee Note on mass tort class actions).

89. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

emphasis that the class action certification was limited to plaintiffs in pending cases in only one district.

There remained the challenge of moving beyond aggregation of the asbestos cases pending in a single court. What was needed was another class action technique, and asbestos litigants attempted the extreme use of two such techniques.

First, the settlement class action could potentially fill the bill. Lawyers for the Center for Claims Resolution devised a path-breaking strategy designed to provide a remedy for all people occupationally exposed to asbestos and packaged this solution as a class action, arguing that the class certification criteria should be applied in a relaxed manner because of the settlement. The Third Circuit ruled that the fact of settlement did not warrant relaxation of the certification requirements⁹⁰ and a proposal to amend Rule 23 to add an explicit provision for settlement class actions soon followed.⁹¹ In *Amchem Products, Inc. v. Windsor*, the Supreme Court rejected the Third Circuit's view that all certification factors apply with full force in the settlement context, but also ruled that this particular settlement failed due to differences in circumstance among class members.⁹² The Court recognized that although predominance of common questions could be "readily met" in consumer, securities fraud, or antitrust class actions, it could not be readily met in mass tort cases.⁹³ Moreover, although the objections of the framers of the 1966 amendments to Rule 23 did not preclude mass tort class actions,⁹⁴ their misgivings do call for caution in certifying mass tort class actions. In addition, even if there were predominant common questions, there must also be "structural assurances" of adequate representation as well.⁹⁵ In the wake of *Amchem*, common question settlement class actions might still be possible, but probably not for so sprawling a class as the one envisioned.

The second technique attempted was the limited fund "mandatory" no opt-out class action, which emphasized the limited funds available to pay judgments. Certainly many producers of asbestos products confronted bankruptcy, and an arrangement accomplished through the class action device might be superior to dismembering the companies through the bankruptcy process. That technique was tried in the

90. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

91. See *Proposed Amendments to the Federal Rules*, 167 F.R.D. 523, 559 (1996) (proposing addition of a new Federal Rule of Civil Procedure 23(b)(4) authorizing settlement classes).

92. 521 U.S. at 592 (1997).

93. *Id.* at 625.

94. See *supra* note 38 (quoting Court's treatment of 1966 Advisory Committee Note).

95. See *Amchem*, 521 U.S. at 627.

mid-1980s in connection with some claims by property owners who incurred costs for asbestos abatement. Although recognizing the urgency of the problems of asbestos litigation, the Third Circuit held in 1986 that the limited fund theory could not be used, in part because that suit did not even attempt to include all property claims, much less personal injury claims as well.⁹⁶

Efforts along this line nevertheless continued, and in 1999 the Supreme Court confronted a strong argument that there was a limited fund in the *Ortiz* case, which involved an asbestos producer that had relatively insignificant assets except for a dubious claim against two insurers, which might be ruled invalid by the California courts.⁹⁷ Both sides faced financial disaster. The insurers might confront virtually unlimited liability unless they succeeded in the California courts. The asbestos company faced catastrophic liability due to asbestos litigation if the insurers did prevail. Compromising to avoid the peril, they agreed to a settlement limited fund mandatory class action creating a billion dollar fund to pay claims by people injured by exposure to asbestos. The Supreme Court rejected this innovative use of Rule 23, insisting that limited fund class actions be kept near what it found to be the historical model, which did not allow such an adventurous use of Rule 23.⁹⁸

In sum, the asbestos litigation class action experience perfectly illustrates the role of procedural innovation in facilitating megalitigation and the ability of megalitigation to prompt procedural innovation. At the same time, it also illustrates the limitations on that innovation; asbestos class actions have repeatedly been struck down for exceeding the existing capacity for class action solutions to mass tort problems. Perhaps those limits should prompt further amendments of Rule 23, a possibility Chief Justice William Rehnquist mentioned in his brief concurring opinion in *Ortiz*.⁹⁹ If such changes were forthcoming, it would be clear that they responded in part to what the Chief Justice called the "elephantine mass of asbestos cases,"¹⁰⁰ further showing that this ongoing megalitigation has been the sparkplug of procedural change in the area.

96. *In re School Asbestos Litigation*, 789 F.2d 997 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986).

97. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

98. *Id.* at 841-48. Of course, one could compare this fealty to the intentions of the 1966 framers to the indifference the Court displayed two years before to their explicit caution about mass tort class actions under Federal Rule of Civil Procedure 23(b)(3) (see *supra* notes 37 and 38), but the Court's argument was that (b)(3) was *intended* to be adventurous, while (b)(1)(B) was not.

99. *Id.* at 865 (Rehnquist, C.J., concurring).

100. *Id.*

B. Multidistrict Transfer and Consolidation

Both multidistrict transfer and consolidation have risen to new importance due to asbestos litigation.

Initially, the Judicial Panel on Multidistrict Litigation declined in 1977 to transfer asbestos cases on the ground that they did not present sufficient common questions.¹⁰¹ In 1991, it changed its decision because the volume of asbestos litigation had risen to a magnitude that “threaten[ed] the administration of justice and require[d] a new, streamlined approach.”¹⁰² Thus, the Panel sought to use the transfer power to the fullest to deal with the problems of megalitigation by transferring over 26,000 asbestos personal injury cases to a single district judge for combined treatment. In the process, it suggested a variety of cutting edge techniques for the transferee judge to consider, including a single national class action trial or other types of consolidated trials, limited fund class action determinations, and exploration of global settlement. The *Amchem* settlement proposal grew directly from negotiations after the transfer,¹⁰³ and questions about whether cases so transferred should be returned continue to arise. The Panel’s action strained its statutory authority, which usually does not include telling the transferee judge what to do with the cases,¹⁰⁴ and is strong evidence of the pressure asbestos litigation has placed on this procedural tool and the potential utility of the tool for resolving some problems of megalitigation.

Consolidation for trial has also reached its apogee due to asbestos litigation. The original purpose of consolidation was to avoid wasting time when separate cases would entail holding essentially the same trial twice.¹⁰⁵ But asbestos litigation prompted courts to push the possibilities of consolidation to its limits and presented the appellate courts with questions about what those limits were. Perhaps the record was set by a state court in Baltimore that proceeded to “try” more than 8,500 asbestos personal injury claims in one proceeding.¹⁰⁶

101. *In re Asbestos and Asbestos Insulation Material Products Liability Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977) (refusing to transfer asbestos cases).

102. *In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991).

103. See *Amchem*, 521 U.S. at 599 (reporting that “[a]fter the consolidation [pursuant to the MDL Panel’s order], attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations”).

104. The Panel only has authority to transfer. “The Panel does not review decisions of the transferee court. Only the Court of Appeals for the transferee district has that authority.” Weigel, *supra* note 50, at 578.

105. For background on consolidation, see Marcus, *supra* note 54, at 862-87.

106. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1839-40 (1995) (describing the dynamics of the Baltimore “common issues” trial).

Again, Judge Robert Parker moved to a different level. He sought to solve his problems in dealing with thousands of asbestos cases by trying a sample of the cases and using the verdicts to provide an "average" recovery for those claimants whose cases were not tried.¹⁰⁷ Judge Parker's innovative sampling effort received a good deal of favorable academic press,¹⁰⁸ but the Fifth Circuit eventually held that it was not permissible.¹⁰⁹

C. Discovery

Like much product liability litigation, asbestos cases show that broad discovery is important to ensuring success for plaintiffs. Early on, plaintiffs usually lost their cases, but by the mid 1970s, plaintiff discovery had unearthed the evidence necessary to win on a regular basis. As the Third Circuit recognized while bemoaning the growing burden of asbestos litigation, "The procedures of the traditional tort system proved effective in unearthing the hazards of asbestos to workers and the failure of its producers to reduce the risk."¹¹⁰ Undoubtedly, some who urged that broad discovery be curtailed were prompted in part by asbestos litigation, but it does not seem distinctive in that regard.

D. Judicial Case Management

When it upheld Judge Parker's certification of a common questions class action for all the asbestos cases pending in his court, the Fifth Circuit warned that:

The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past.¹¹¹

107. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

108. *See Saks & Blanck, supra* note 86, at 826-32, 839 (praising the method); Robert Bone, *Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 571-74 (1993) (raising some questions about the method). For further development of the sampling ideas that Judge Parker introduced, see Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998).

109. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (holding that the trial method violated the right to jury trial and was based on improper assumptions).

110. *In re School Asbestos Litigation*, 789 F.2d 996, 1000 (3d Cir. 1986).

111. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).

This attitude lies at the heart of the case management movement. As the Fifth Circuit's warning suggests, asbestos cases provided a theater for that sort of effort. Thus, the RAND study of asbestos litigation in the mid-1980s found that courts facing large asbestos caseloads took an active role in managing the cases and developed specialized routines for handling them.¹¹²

E. Settlement Promotion

Judicial promotion of settlement has sometimes played a very prominent role in asbestos litigation. The *Amchem* settlement apparently originated during sessions on asbestos litigation conducted at the Federal Judicial Center.¹¹³ The *Ortiz* settlement was conducted in part with the assistance of Judge Patrick Higginbotham as special settlement master, acting under designation by Judge Parker.¹¹⁴

Besides these remarkable judicial roles in settlement promotion, asbestos litigation has more generally involved ordinary judicial settlement promotion activities. And path-breaking settlement promotion efforts for ordinary cases have emerged in asbestos litigation. One effort was the creation of the Center for Claims Resolution,¹¹⁵ which may provide a model for large-scale resolution of claims in megalitigation. Indeed, defendants once urged that class certification should be denied because the predecessor to the center offered a superior means of responding to asbestos litigation.¹¹⁶ Another was the practice of "inventory" settlements by which some defendants pay lump sums to settle all asbestos cases being pressed by a single lawyer or firm.¹¹⁷

Reportedly, the problem with settling asbestos cases has been that defendants lost patience with settlement as a way to reduce their caseloads. From defendants' perspective, it seemed that the rate of asbestos filings did not decrease even when they actively settled

112. See DEBORAH HENSLER, ET AL., ASBESTOS IN THE COURTS 72-78 (1985) (describing standardization and case management employed in asbestos litigation).

113. See *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 264 (E.D. Pa. 1994) (reporting that negotiations emerged in part from meetings at the Federal Judicial Center), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

114. See *Ahearn v. Fibreboard Corp.*, 167 F.R.D. 505, 515-16 (E.D. Tex. 1995) (describing role of Judge Higginbotham).

115. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 L. & CONTEMP. PROBS. 13 (Autumn 1990) (describing the methods of the center).

116. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (rejecting argument that the Wellington Facility, a precursor to the Center for Claims Resolution, was superior to a class action in court as a method of resolving asbestos claims).

117. See *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 294 (E.D. Pa. 1994) (describing use of inventory or block settlements by group of asbestos defendants); HENSLER, ET AL., *supra* note 112 (describing block settlements of asbestos cases).

cases.¹¹⁸ Instead, the plaintiffs' lawyers found and filed other cases. As a result, some other claimants supposedly refused to continue making inventory settlements and to enter serious settlement discussions only as individual cases were set for imminent trial.

F. Preclusion

The prospect of using preclusion to simplify asbestos litigation understandably has been inviting, for one would think that some propositions should be taken as established. The Ad Hoc Committee on Asbestos Litigation, for example, entitled one section of its report "Asbestos: Undeniably Dangerous."¹¹⁹ Should defendants be precluded from denying the undeniable?

But defendants have won some asbestos suits. Although the effort to use issue preclusion has been made by plaintiffs, it has not succeeded. The most notable example occurred when Judge Parker entered an omnibus collateral estoppel order foreclosing re-litigation of several points, including the point that "[p]roducts containing asbestos are unreasonably dangerous."¹²⁰ Because defendants had won many of the cases that went to trial, under customary criteria for nonmutual collateral estoppel the Fifth Circuit ruled that preclusion was not authorized.¹²¹ Moreover, the court suggested that preclusion would be proper only if "all juries presented with similar evidence regarding asbestos products would be compelled to find those products unreasonably dangerous,"¹²² seemingly parroting the standard for granting a directed verdict. Thus, the promise of preclusion was not realized.

V. THE CONTRASTING ABSENCE OF PROCEDURAL INNOVATION IN TOBACCO LITIGATION

The litany of procedural milestones from asbestos litigation contrasts starkly with to the absence of any similar impact from tobacco litigation. Maybe this shows that this observer knows too little about tobacco litigation; the remainder of this conference should begin to solve that problem. Maybe this is because tobacco litigation is still in its infancy, so that its procedural impact is yet to come. But if that is

118. See *Georgine*, 157 F.R.D. at 294 (reporting that group of asbestos defendants decided to stop pursuing inventory settlements "after finding that the settlement strategy was not diminishing the number of pending claims").

119. See Report of Judicial Conference Ad Hoc Committee on Asbestos Litigation, *supra* note 87, at 4 (Part II of report entitled "Asbestos: Undeniably Dangerous").

120. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982).

121. *Id.* at 346.

122. *Id.*

so, it seems odd that we are already gathered here to assess things in the wake of the tobacco wars, and this is hardly the first symposium about tobacco litigation.

It is important to recognize that there is a significant subjective element to the conclusion that tobacco litigation has failed to produce important procedural innovation. Undoubtedly, tobacco litigation has produced decisions that press the limits of a number of topics that could reasonably be characterized as procedural. Not surprisingly, discovery disputes have cropped up on a variety of issues, particularly including the application of the attorney-client privilege and the implementation of protective orders that recur in other complex litigation. Joinder problems have plagued some tobacco cases.¹²³ Multidistrict procedures have been employed on occasion. And other examples could be added. In general, however, these decisions have not seemed to be milestones in the procedural hierarchy in the same way as those in asbestos litigation and other megacases.

Perhaps this is best illustrated by the procedural decision in tobacco litigation that is probably best known, the *Castano* class action.¹²⁴ That case surely had some potential for breakthrough. The district judge invoked Robert Frost's choice to take the "road certainly less traveled, if ever taken at all,"¹²⁵ and the Fifth Circuit suggested that it "may be the largest class action ever attempted in federal court."¹²⁶ As we all know, the appellate court invalidated the district judge's class certification on the ground that, as to this immature mass tort, a nationwide class action could not be maintained. In the wake of this case, efforts went ahead to certify state-wide classes with mixed success. *Castano* surely belongs "in the books"¹²⁷ and is some evidence of the impact of tobacco litigation on procedure.

But the impact of *Castano* is quite limited. Actually, plaintiffs in *Castano* sought to follow the lead of the successful earlier effort to obtain certification of an asbestos personal injury class, and the appellate court, therefore, explained why the certified asbestos case did not justify class certification in *Castano*.¹²⁸ To the contrary, the correct reasoning flowed from another asbestos class action, the Third Cir-

123. See, e.g., *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547 (E.D. Wis. 1999) (holding that three smokers could not join, under Fed. R. Civ. P. 20, in their suit for damages due to smoking).

124. *Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

125. *Id.* at 737.

126. *Id.*

127. See, e.g., RICHARD MARCUS & EDWARD SHERMAN, *COMPLEX LITIGATION* 323 (3d ed. 1998) (including *Castano*, 84 F.3d 734, as a principal case).

128. See *Castano*, 84 F.3d at 743-745 n.18 (distinguishing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (1986) discussed in text accompanying *supra* note 89).

cuit's decision in *Amchem*.¹²⁹ So asbestos led the way, and tobacco merely followed. Moreover, a central problem for class certification in *Castano* was not really procedural. The claim asserted relied on cutting edge tort law, and, thus, stood in stark contrast to the claims in asbestos litigation, which had been litigated for years before plaintiffs attempted to batch them in class proceedings.¹³⁰

On balance then, the biggest procedural case in the tobacco firmament is more a boomlet than a boom. If megalitigation is a major stimulant for procedural innovation, that is a surprise. The following are some possible explanations.

A. *Megalitigation Does Not Prompt Procedural Innovation*

As the weakness of the conclusion that megalitigation leads to procedural innovation suggests, the entire idea may be wrong. It is weak, at least, because the definition is so uncertain. No one has yet defined the term "complex litigation," and many who criticize the tendency of procedural rule makers to focus on this sort of cases are talking about litigation of much smaller magnitude than tobacco litigation. So the absence of procedural impact makes sense.

This skepticism is rebuttable. As has been shown for decades, there have been efforts to refine procedures in order to address the difficulties that result from specific types of megalitigation. And at least some procedural innovations appear directly related to the genesis of large scale litigation. The Judicial Panel on Multidistrict Litigation is only the most obvious example. Had the plaintiffs succeeded in preserving class certification in *Castano*, for example, the availability of the class device itself would have been a generating factor behind litigation of almost unimaginable dimensions.¹³¹ Similarly, any state-wide class actions that succeed will rely considerably on that device. And asbestos shows that litigation of that dimension often has produced momentum for further procedural innovation.

So the absence of prominent procedural innovations for tobacco litigation does not significantly undermine the general conclusion that megalitigation has exerted a magnetic effect on procedural change.

129. See *id.* at 742-43 n.15 (citing *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996)).

130. See *id.* at 746-47 (discussing the "immature tort" raised in the tobacco class action and holding that, "a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis").

131. See *supra* note 126 and accompanying text (describing case as "the largest class action ever attempted in federal court").

*B. Mass Tort Megalitigation Affects Procedure
Only If Plaintiffs Win*

Defining megalitigation is a risky undertaking, but it seems agreed that suits by individual smokers would not qualify under most measures. There have been at least two waves of that sort of tobacco litigation over the last forty years, but few or no academic conferences about it until recently. The likely reason is that plaintiffs did not win any cases. Among the various types of mass tort megalitigation, tobacco seems unique because no plaintiff received a penny for decades.

Mass tort megalitigation usually occurs only after an initial group of plaintiffs succeed, either in court or at the bargaining table. Asbestos again provides the comparison; even plaintiffs who were unsuccessful in early asbestos litigation efforts were likely to manage a settlement with some defendants. In 1973, plaintiffs won a breakthrough victory,¹³² prompting more suits. Yet four years later, the number of those suits did not impress the Judicial Panel on Multidistrict Litigation when it was asked to transfer them for consolidated proceedings.¹³³

Only gradually did the asbestos traffic jam develop. During that time, other judges focused on similar concerns in other cases. In 1981, for example, Judge Williams explained his certification of a Dalkon Shield class action in part by referring to the number of Dalkon Shield cases then on file and pointing out that if they all went to trial and took as long as the one he had just tried, they would immobilize the federal judiciary.¹³⁴ With the bankruptcy filing of Manville in 1982, the true prospective dimensions of asbestos litigation began to dawn on many. By the beginning of the 1990s, things had become sufficiently pressing to prompt Chief Justice Rehnquist to appoint a special committee to study the problem. That committee recommended action by Congress. In 1991, the Judicial Panel on Multidistrict Litigation reversed position to favor consolidating all the federal asbestos cases.¹³⁵

The reason this judicial "crisis" developed was that asbestos litigation was a successful venture for plaintiffs, and thus for plaintiffs' law-

132. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *Borel* has been called "the bellwether asbestos case." THOMAS WILLGING, *ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES* 9 (1985).

133. See *In re Asbestos and Asbestos Insulation Material Prod. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977) (declining transfer).

134. See *In re N. Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

135. See *supra* notes 103-05 and accompanying text.

yers. According to some defendants, that success prompted lawyers to locate new plaintiffs to replace former ones when cases settled, and they therefore stopped making inventory settlements with such lawyers. Similarly in Dalkon Shield litigation, lawyers' interest in filing new cases depended on the results of earlier cases. Not much plaintiff success is required to prompt major bursts of litigation, however. In the Bendectin litigation, for example, a single short-lived plaintiff victory sparked large-scale litigation before it was reversed on appeal.¹³⁶

For years, there was no plaintiff success in tobacco litigation. Without endorsing the tobacco industry's scorched earth defense policy, one must concede that lawyers were not trying hard to locate more potential plaintiffs, as asbestos lawyers were supposedly doing. To the contrary, they were shying away from tobacco litigation because the returns, even though potentially high, were outweighed by the amazing cost of litigating against these adversaries. Without plaintiff victories, there would be no mass tort megalitigation; and without mass tort megalitigation, there would be no stimulus toward procedural innovation. As the Fifth Circuit emphasized in *Castano*, there was no "judicial crisis" in tobacco litigation that would warrant using the class action device.¹³⁷

Arguably, mass tort megalitigation did not ensue precisely because the tobacco companies foresaw that possibility and effectively preempted it.¹³⁸ It appears that the potential impact of asbestos litigation was not similarly apparent to asbestos companies for years. At the time Manville filed its Chapter 11 petition, newspaper reports indicated that the company had only recently forecast its potential exposure.¹³⁹ It is evident that the tobacco companies saw the handwriting

136. See Green, *supra* note 80, at 159-66 (describing how an early plaintiff victory sparked interest in Bendectin litigation and led to the filing of many more cases even though the judgment was reversed and remanded for a retrial in which defendants prevailed).

137. *Castano*, 84 F.3d at 748.

138. See Robert Rabin, *A Sociological History of Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856-58 (1992) (describing the tobacco industry's tactics of defending every claim, no matter what the cost, as "unique in the annals of tort litigation," and explaining that this intransigence was stimulated by the stakes involved).

139. Thus, initial reports on the Chapter 11 filing emphasized that it was a surprise given the seeming economic health of the company. See, e.g., Merrill Brown & David Hoffman, *Conglomerate Facing Asbestos Liability Files for Bankruptcy*, WASH. POST, Aug. 27, 1982, at A1 (reporting that "[t]he Manville action today shocked Wall Street analysts and other industry observers"). The company's explanation was that a study it had commissioned forecast a large number of additional asbestos personal injury filings, and that accounting rules required that it create a reserve account for this newly-identified litigation exposure that would trigger a default in its outstanding loans. See *id.*; Tamar Lewin, *Manville Bankruptcy Challenged*, N.Y. TIMES, Nov. 17, 1983, at D4, col. 4 (reporting that the required creation of a reserve left the company "no choice but to file for bankruptcy"); Tamar Lewin, *Manville Ready to File Its Reorganization*

on the wall from the outset. And it is also easy to comprehend the potential impact on the courts had the early litigation results encouraged more suits. Consider the hypothetical suggested by Professor Weber: "What if the representatives of each of the 400,000 Americans that tobacco kills each year were to sue individually?"¹⁴⁰ Had that happened, the inventiveness of courts attempting to solve the tobacco litigation problem through procedural means might have made innovation in asbestos litigation look insignificant.

C. *The Innovations Had Already Occurred or Been Rejected*

Arguably, even a huge outburst of tobacco litigation would not have caused much more procedural innovation. By the time the second wave of tobacco litigation had begun,¹⁴¹ mass tort megalitigation more generally had been around for some time. There must be a limit to the kinds of procedural solutions for any type of megalitigation, and hence, to the procedural innovations that could be used in mass tort megalitigation. Perhaps tobacco did not prompt more innovation because none more was needed. As is sung in the musical *Oklahoma*, "They've gone about as far as they can go!"¹⁴²

Furthermore, the innovators in asbestos litigation had ultimately been unsuccessful at least as often as they had succeeded with their new procedures; the history of that litigation is littered with the corpses of innovations accepted by district courts that were scotched by the appellate courts. The Supreme Court invalidated two settlement class actions, and the Fifth Circuit rebuffed Judge Parker's efforts to broaden issue preclusion or rely on trials of a sample of cases to establish values for others. Already in 1991, the Ad Hoc committee on Asbestos Litigation, therefore, had concluded that "[n]o adequate procedures exist to enable the justice system to deal with the unique

Plan, N.Y. TIMES, Oct. 13, 1983, at D1 col. 1 (reporting that the company had profits from its continuing operations, but that "the burden of current and future asbestos-related lawsuits eventually could drive it out of business"). Plaintiff lawyers, meanwhile, denied that there was a risk of true insolvency, and denounced the company for filing the Chapter 11 petition because the automatic stay in bankruptcy effected by the bankruptcy petition prevented pursuit of claims against Manville. See *Lawyers Plan Strategy Against Manville*, N.Y. TIMES, Aug. 30, 1982, at D3, col. 1 (reporting that plaintiff attorneys would seek dismissal of the Manville bankruptcy filing as "fraudulent").

140. Mark Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation Over Tobacco Injuries*, 33 GA. L. REV. 979, 1010 (1999).

141. See Rabin, *supra* note 138, at 865 (applying the term "second wave" to this stage of tobacco litigation).

142. Richard Rogers and Oscar Hammerstein II, *Kansas City*, in OKLAHOMA! (St. James Theater on Broadway, Mar. 31, 1943).

nature of asbestos cases.”¹⁴³ By the time the tobacco litigation heated up in the late 1990s, the lawyers likely knew what could and could not be done with procedure.

The fact that at least some of the primary tobacco litigators on the plaintiffs’ side got their start in asbestos litigation supports this explanation.¹⁴⁴ One would expect them to use the techniques that they already knew about. In *Castano*, for instance, they seemingly tried, in part, to follow the path laid out a decade before by an asbestos class action. More generally, it seems that the tools were in place for similar litigation efforts, perhaps even on the scale that could erupt if tobacco litigation reached its true potential.

But there are also reasons to believe that more procedural innovation could be attempted. Most prominent is the appointment of the Mass Torts Working Group by Chief Justice Rehnquist in early 1998 to study possible procedural changes that might require the involvement of the federal rulemaking and legislation. And in 1999, it produced a report that attached a variety of measures that could go further than any had formerly gone.¹⁴⁵ So the “been there, done that” explanation seems insufficient.

*D. Procedural Innovation Has Been Less Important Than
Substantive Innovation in Tobacco Litigation*

Maybe the problem with tobacco litigation has never been procedural but rather substantive. As Professor Rabin has noted, the final version of § 402A of the Restatement of Torts “sounded the death knell for the first wave of tobacco litigation.”¹⁴⁶ Thereafter, smoking regulation by some legal technique gained prominence across the globe.¹⁴⁷ The second wave of tobacco litigation nevertheless foundered repeatedly on the issue of plaintiff choice; even plaintiffs who succeeded in proving defectiveness of the product might have a high

143. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, *supra* note 87, at 26.

144. Rabin, *supra* note 138, at 865 (pointing out that, asbestos litigation “serve[d] as the most immediate link to the second wave of smoking cases,” and the first big individual suit was handled by attorneys who honed their skills in asbestos litigation).

145. See REPORT ON MASS TORTS LITIGATION, *supra* note 29, at Appendix F (1999) (listing fifteen separate proposals that had been offered for consideration).

146. Rabin, *supra* note 138, at 864.

147. See Robert Kagan and David Vogel, *The Politics of Smoking Regulation: Canada, France, the United States*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE (Robert Rabin & Stephen Sugarman eds., 1993) at 22, 24 (noting that every democratic industrialized country has acted to restrict cigarette smoking).

proportion of responsibility for their injuries assigned to them.¹⁴⁸ That is one reason why plaintiffs did not win, and why no judicial crisis and resulting procedural innovations followed.

What was needed was a new tort theory that sidestepped that problem, and reimbursement for providers of medical support offered promise to do so. Those plaintiffs did not choose to smoke. Under traditional tort doctrine, there are a lot of problems with this theory, and it is not surprising that many courts have rejected versions of it.¹⁴⁹ Moreover, some versions might introduce difficulties like the ones that hamstrung class actions in mass tort litigation. But it clearly has been *the* breakthrough of tobacco litigation in the current phase. And second-hand smoke claims may be another.

Whether or not the reimbursement theory resulted from the brilliant insight of a single lawyer who sought to escape the difficulties presented by the smoker choice,¹⁵⁰ the basic point is that effective innovation in tobacco litigation has come in tort doctrine rather than procedural technique. Surely one could imagine a legal regime in which those who create public health risks that impose costs on public health agencies would be required to pay for the resulting costs. One who reflects on the role of state attorneys general in tobacco litigation is reminded that *parens patriae* was once proposed as a way to deal with substantive problems in antitrust law.¹⁵¹ Surely there are arguments against doing this, perhaps stronger in a system with tort law of the sort that exists in the United States. But arguably, that this is a more straightforward way of addressing the questions posed by this public health problem than procedural innovations.

For some time there has been broad concern that procedural innovation may stifle substantive rights or defenses. A criticism of 1938's Big Bang, magnified by the adoption of the broader class action rule

148. See Rabin, *supra* note 138, at 870-73 (describing emphasis on freedom of choice as a distinctive feature of the "second wave" of tobacco tort litigation).

149. See, e.g., *Ass'n of Wash. Pub. Hosp. Dist. v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2001) (holding that public hospital districts may not sue for unreimbursed costs of treating smokers, and noting that other courts of appeals have held that union trust funds lacked standing to sue on similar grounds).

150. See DAN ZEGART, *CIVIL WARRIORS* 92 (2000) (saying that Mississippi lawyer Mike Lewis was struck, after visiting a dying client in the hospital and reflecting on the high medical costs connected with the client's illness, with the idea of having the state sue for medical costs it had paid for that treatment, and that he relayed this idea to Mississippi Attorney General Mike Moore, whom he had known as a law school classmate).

151. See The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (2001) (authorizing state attorneys general to sue for the "aggregate damages" sustained by citizens of their states). For a critical discussion of the *parens patriae* legislative initiative, see Milton Handler, *Antitrust—Myth and Reality in An Inflationary Era*, 50 N.Y.U. L. REV. 211, 248-56 (1975).

in 1966, has been that the merits do not matter any more; when the procedural innovations are wheeled into place on the litigation battlefield, victory is determined without substantial reference to the merits and hence, to the substance of the case.¹⁵² Thus in 1970, Professor Milton Handler objected that procedural innovation had supplanted substantive innovation in antitrust litigation.¹⁵³ Antitrust litigation is much less prominent nowadays, but Professor Handler's concern is likely to be most prominent in megalitigation. That is the preserve of the "bet your company" case, and tobacco litigation is the biggest such case one can imagine.

Asbestos litigation provides an example of this concern. At least one motivation for the innovative use of class actions in those cases goes beyond solving a judicial crisis. Judges understandably were chagrined at the unevenness of outcomes, and the risk that some injured individuals would recover little or nothing while others received large windfall punitive damages awards. The settlements in *Amchem* and *Ortiz* could be characterized as efforts to replace the tort system with a compensation scheme better suited to the needs of the injured.¹⁵⁴ Thus, procedural innovation could alter substantive rights, a point the Supreme Court mentioned in holding the class certifications in those cases invalid.¹⁵⁵

More generally, Professor Handler's 1970 conclusion about antitrust litigation might apply to much megalitigation during the ensuing three decades. Often the cutting edge procedure loomed as more important than the cutting edge substantive rule. As Professor Hensler noted in 1993, "Most proposals for change focus on procedure rather than substantive doctrine."¹⁵⁶ As some class actions suggested, the

152. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (suggesting that certified securities class actions all settle for about the same proportion of losses, and that the actual merits of the claims must not be important in setting that proportion since the merits must vary among cases). Compare Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 449-53 (1994) (questioning Alexander's conclusions).

153. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 4-5 (1971) (explaining that the "sheer magnitude" of cases had meant that "the procedures associated with massive litigation have come to assume a growing importance to the antitrust practitioner").

154. See Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (questioning the use of the class action device as a method for dealing with perceived deficiencies in substantive tort law).

155. See *Ortiz*, 529 U.S. at 845 ("The Rules Enabling Act underscores the need for caution"); *Amchem*, 521 U.S. at 612-13.

156. Hensler & Peterson, *supra* note 85, at 1052.

substantive rule might be modified to suit the procedure.¹⁵⁷ For example, although medical monitoring could be an important individual remedy, it might become much more important as a substantive method to facilitate class action treatment.

Against this background, the source and focus of innovation in tobacco litigation may be refreshing because it is mainly substantive. That reaction is confirmed by examination of symposia about tobacco litigation that focus on tort law, not procedure.¹⁵⁸ Because the dimensions of this new form of tort litigation make it megalitigation, the techniques that have been developed for other megalitigation may often need to be deployed. And maybe some new techniques would also be helpful, for as we have seen the string of innovation has not necessarily run out. But there is also a possibility that the future holds more examples of major litigation that breed substantive innovation rather than procedural breakthroughs.

VI. CONCLUSION

My starting point was the reaction that, unlike other mass tort megalitigation, tobacco litigation had not produced many notable changes in procedure. Because the litigation is widely touted as the biggest in history, this result seems notable. Other megalitigation surely spurred important procedural changes, and procedural changes facilitated some of that litigation. Yet the connection between the biggest cases and the biggest procedural changes is not particularly strong. Although asbestos litigation lumbered into a wide variety of procedural rules due to its size, those dimensions were ultimately a product of the rate of success for individual asbestos plaintiffs. Tobacco plaintiffs never had much success until the states started filing suits relying on a new substantive theory, not a new set of procedures.

And so I end on a tentative note that those who have deplored the reign of procedure may find uplifting. Perhaps a corner has been

157. See, e.g., *Blackie v. Barrack*, 524 F.2d 891, 908 & n.24 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) (defendants argued that proof of reliance precluded class certification, and the court remarked that it could revise the standards for proof of reliance and thereby solve the problem raised by defendants).

158. See, e.g., Symposium, *Beyond Tobacco: Tort Issues in Light of the Cigarette Litigation*, 27 PEPPERDINE L. REV. 685-768 (2000) (speculating on the impact of the new liability theories on which tobacco litigation was based); Symposium, *Torts and Tobacco*, 33 GA. L. REV. 693-1020 (1999); Symposium, 22 SO. ILL. U. L. J. 467-723 (1998).

By way of contrast, into the 1990s symposia about procedural innovation in complex litigation make no mention of tobacco litigation. See, e.g., *Symposium on Problems in Disposition of Mass Related Cases and Proposals for Change*, 10 REV. LITIG. 209-584 (1991) (mentioning many types of litigation including asbestos, Agent Orange, DES and Dalkon Shield, but not tobacco litigation).

turned, and the proceduralists can be relegated to their proper role as handmaidens to the substantive law. At least recent events in tobacco litigation suggest that procedure plays a subservient role in its litigation breakthroughs. Other recent events, however, suggest that the new tobacco tort paradigm may not be readily transferred to litigation concerning other products.¹⁵⁹ If future megalitigation reverts to past form, we proceduralists can look forward to full employment in the future. This one, at least, is not yet ready to switch to torts.

159. Thus, suits against gun makers have not enjoyed great success. See Harriet Chang, *Gunmakers No Easy Target*, S.F. CHRON., Aug. 12, 2001, at A4 (reporting that the "tobacco model isn't working for cities as [a] strategy for lawsuits." *Id.*).